No. 20537

In the

United States Court of Appeals

For the Ninth Circuit

ALBERT J. WILD and AIR CONDITIONING SUPPLY CO., INC.,
Appellants,

vs.

UNITED STATES OF AMERICA, BENNETT Y. BREWER, and VALLEY NATIONAL BANK,
Appellees.

Reply Brief of Appellants

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I.

APPELLEES' ARGUMENT DOES NOT EXCUSE APPELLEES' FAILURE TO PROVE THAT BREWER'S INVESTIGATION WAS "FOR THE PURPOSE OF ASCERTAINING THE CORRECTNESS" OF APPELLANTS' INCOME TAX RETURNS.

The most striking, and most significant, fact concerning appellees' argument is that it fails to make any mention of the regulation of the Internal Revenue Service (published at the time Brewer's summons was issued) describing the functions of the Intelligence Division of which Special Agent Brewer is a part, 30 Fed. Reg. 9368 (July

28, 1965), cited and quoted in full in appellants' brief, pages 12-13—nor, for that matter, of Brewer's testimonial description of his job function as a criminal investigator (also quoted in appellants' brief). Appellees' argument based on victories in earlier cases involving variant facts (including a different regulation describing the function of the Intelligence Division more expansively) cannot suffice to contradict the fact in this case that Special Agent Brewer was acting here as no more and no less than a criminal investigator—like any other policeman or FBI agent; and, it is respectfully submitted, appellees' argument should not alternatively be allowed to avoid that fact. See *Local 174 Etc. v. United States,* 240 F.2d 387 (9th Cir. 1956); *Martin v. Chandis Securities Co.,* 128 F.2d 731 (9th Cir. 1942), affirming 33 F. Supp. 478 (S.D. Cal. 1940); *United States v. Carey,* 218 F. Supp. 298, 299, n. 5 (D. Del. 1963)*

Moreover, even if the case could be considered as an abstract matter without reference to the record and the illuminating regulation cited, the cases cited in appellees' brief do not necessarily support the blanket authorization the government seeks to use the administrative summons authorized by Section 7602 of the Code for any type of

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*The decisions of the Supreme Court in *United States v. Powell,* 379 U.S. 48, 57-58 (1964) (quoted in appellants' brief, pages 9-11—not mentioned as to the point here involved in appellees' brief) and in *Reisman v. Caplin,* 375 U.S. 440, 449 (1964) (quoted in appellants' brief, page 11) indeed indicate that the facts here presented may not be thus ignored.

In that regard, the citation in *Reisman v. Caplin* of *Boren v. Tucker,* 239 F.2d 767, 772-773 (9th Cir. 1956), contrary to the implication drawn therefrom in appellees' brief, would seem to confirm the view expressed in *Boren v. Tucker* that it is a sound defense to an enforcement proceeding that "the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution." The Court obviously was not merely "enumerating types of defenses which . . . been raised," but types of defenses which were approved as such.

investigation, even in aid of an attempted criminal prosecution.

Apart from *Boren v. Tucker* considered in appellants' brief, pages 16-17, *Tillotson v. Boughner,* 333 F.2d 515 (7th Cir. 1964), *cert. denied,* 379 U.S. 913 (1964), involved a summons issued by a Special Agent in order to discover the name of a taxpayer on whose behalf the respondent witness had paid more than $215,000 as a tax payment without disclosure of the name of the taxpayer or the years covered by the payment made. The use by the Special Agent of a Section 7602 summons was upheld in the peculiar circumstances presented upon the particular finding of the court that, at that time, under Section 1118.6 of the Treasury Department Statement of Organization and Functions (quoted in footnote 4 of the court's opinion, 33 F.2d at 516-517), Special Agents were authorized to investigate not only criminal matters "but also to ascertain civil penalties" [33 F.2d at 517]. Indeed, the concurring opinion of Judge Knoch specially noted that the court was proceeding on the assumptions that no criminal prosecution existed at the time the summons was issued and that Special Agents of the Intelligence Division, under the cited regulation, were authorized to ascertain civil penalties as well as investigate possible criminal violations. Thus, the *Tillotson* case points up a crucial distinction between the prior cases and this case in that the regulation governing the function of Special Agent Brewer at the time he issued the summons in this case clearly limited his function to ascertaining whether or not a violation of criminal law had occurred and to assisting in prosecutions for criminal violations.

In *Wright v. Detwiler,* 345 F.2d 1012 (3d Cir. 1965), examination of the District Court opinion which the Cir-

cuit Court affirmed *per curiam,* discloses that the court did not focus at all upon the question here involved but instead upon the right of the taxpayers in that case to resist production of the records of their family-owned corporation under the privilege of the Fifth Amendment and related rights under the Fourth Amendment. Insofar as the point here involved may have been raised, it is especially noteworthy that the evidence produced by the government at the enforcement hearing consisted of testimony by a revenue agent (rather than the Special Agent) who testified sufficiently to persuade the court that "a genuine tax liability investigation" was involved [241 F. Supp. at 755].

In *In re Magnus, Mabee & Reynard, Inc.,* 311 F.2d 12 (2d Cir. 1962), *cert. denied,* 373 U.S. 902 (1963), the court particularly noted that the summonses involved were issued at a time when a Special Agent was "just beginning his investigation of the taxpayers' returns" and at a time when no conclusion could have been made as to whether any criminal action was indicated (an indictment having apparently been obtained some ten months subsequently merely to prevent the statute of limitations against criminal prosecutions from running). Indeed, it appears that the investigation involved a taxpayer who did not file any income tax returns for a period of nine years and that

> "Through the issuance of the summons, the *revenue agents* sought to obtain access to the corporation's books to ascertain what taxes, if any, should have been reported by the taxpayers for the years in question. . . ." [311 F.2d at 14, emphasis supplied.]

In short, in the cases cited by the government as well as in any other case conceivable, the "one principle in common [to] the divergent authorities" is that the question of

whether an investigation is for the purpose alleged by the government in seeking enforcement "is one of fact" [*United States v. Carey,* 218 F. Supp. 298, 301 (D. Del. 1963).]

Nor may the serious Constitutional question which the breadth of appellees' argument would raise be avoided by ignoring the question and instead arguing some other case, as appellees' brief does. The Constitutional limitations upon "the use of an *unrestricted* administrative subpoena power" [*Boren v. Tucker,* 239 F.2d at 773], regardless of the nature of the investigation as a criminal investigation, has been too well stated in *United States v. O'Connor,* 118 F.Supp. 248 (D.Mass. 1953), *Application of Myers,* 202 F.Supp. 212, 213 (E.D.Pa. 1962) and *United States v. Lipshitz,* 132 F. Supp. 519 (E.D.N.Y. 1955) to be so lightly dismissed or avoided. *Cf.* also the required according of Constitutional rights when an investigation "has begun to focus on a particular suspect" and has become in effect accusatory in nature, *Escobedo v. Illinois,* 378 U.S. 478, 490 (1964), which recently has been persuasively defined in the context of tax investigation as applicable when a Special Agent of the Intelligence Division appears on the scene, as follows:

> "The next step in the fraud investigation is the appearance of the Special Agent. In its broadest interpretation the 'investigation' is not necessarily concluded by the appearance of the Special Agent on the scene. Indeed, frequently the Special Agent's task is merely to obtain evidence, oral and written, which may be used against that particular taxpayer in a criminal prosecution. The effect, then, is to shift, at a point not later than his appearance, the investigatory process to one of accusation—truly no different than the interrogation of a defendant after arrest in a non tax fraud criminal case. At this point, since there is unquestionably a criminal 'investigation' underway and henceforth since any information which is obtained from the

> taxpayer will be obtained with an eye toward possible criminal sanctions, there is clearly a focusing on that particular taxpayer as the suspect and no one else. It is submitted that the right to counsel should attach no later than at the appearance of the Special Agent."

Hewitt, *Sixth Amendment Rights of the Taxpayer in a Fraud Investigation,* ABA Bulletin of the Section of Taxation 90, 121-122 (Jan. 1966). But see *Kohatsu v. United States,* 65-2 USTC ¶ 9715 (9th Cir. 1965).

Finally, what appellees have otherwise missed can hardly be supplied by attempting to build upon the explanation in appellants' brief that the existence of some "tax liability", regardless of the amount, is one premise of a criminal income tax case. As explained in appellants' brief read in context, that fact cannot convert Brewer's function from that of a criminal investigator to that of a revenue agent who may truly be engaged in ascertaining the correctness of an income tax return. It bears re-emphasis that, no matter how much appellees may ignore what the regulation makes clear as a matter of law and fact and no matter with what cleverness appellees may attempt to circumvent the fact, the fact remains that Brewer was and is engaged in nothing more and nothing less than criminal investigation unauthorized by Section 7602 of the Code (and, if not, proscribed by the Constitutional provisions pertaining to criminal investigations).

II.

APPELLEES' ARGUMENT DOES NOT EXCUSE APPELLEES' FAILURE TO PROVE THAT THE RECORDS SOUGHT "WOULD HAVE A DIRECT RELATION TO THE CORRECTNESS" OF APPELLANTS' RETURNS AND THAT THE RECORDS SOUGHT ARE REQUIRED FOR THAT PURPOSE.

Appellees' imaginative argument as to why the records sought might have some relation to the correctness of ap-

pellants' returns falls far short of the showing required by any meaningful standard. As for "possible improper interest deductions", appellees did not bother to prove even that appellants had taken any deduction for any interest payment. As for the speculation that if loans were used by the individual taxpayer and were repaid by the corporation there might be constructive dividends, first, the testimony did not advert to any such possibility, and second, the reason for that lapse may well have been that in fact Brewer already had information defeating that remote possibility. (It will be recalled that Brewer testified that he had already obtained in some way "the bank's central liability control with respect to these two borrowers" [Tr., p. 52]; so far as appears, the document thus already viewed by Brewer gave him all the information relevant to any such issue.)

Thus, in this case at least as much as in *D.I. Operating Company v. United States,* 321 F.2d 586 (9th Cir. 1963), Brewer's conclusionary affidavit, placed in issue by the pleadings, and his slight, inconclusive testimony, must be viewed as "inadequate to support the lower court's order." See also *Local 174 Etc. v. United States,* 240 F.2d 387, 390-391 (9th Cir. 1956); *cf. Martin v. Chandis Securities Co.,* 128 F.2d 731, 735 (9th Cir. 1942).

III.

APPELLEES' ARGUMENT DOES NOT EXCUSE THE DEPRIVATION OF APPELLANTS' RIGHTS UNDER THE FEDERAL RULES EFFECTED WITHOUT A JUDICIAL DETERMINATION SUSPENDING THE RULE.

Appellees' argument that their deliberate flouting of the direction of the Supreme Court in *United States v. Powell* that enforcement proceedings such as that here involved should be instituted under the Federal Rules "by filing a complaint, followed by answer and hearing" may be exe-

cuted by reference to Rule 81(a)(3) ignores the fact that at no time did appellees request the court below to order a suspension of the Federal Rules and at no time was such an order entered. Thus, there is no occasion for this Court to consider whether or not such an order would have been appropriate if it had been entered. The cases cited by appellees, all decided prior to the Supreme Court decision in the *Powell* case, can hardly be viewed as having any bearing on the proceedings here involved in the circumstances.

Nor can appellees' self-decreed suspension of the Rules be excused by the court's deeming the "petition" a complaint after the fact, *i.e.*, after a summary hearing was had and the benefits which appellants would have had from the Federal Rules if the proceedings in fact had been commenced by a complaint (particularly the benefit of pre-trial discovery, which would have enabled appellants to develop additional facts in aid of their position contradicting Brewer's conclusionary allegations) had in effect been denied to them.*

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*Nor, of course, should it avail appellees to argue here, as apparently they intend to argue, that the *Powell* decision was wrong. If it was, appellees have more than the usual opportunity afforded to a litigant to have the matter reheard by the Supreme Court. Meanwhile, it seems only fitting that appellees as much as other litigants should be bound to proceed in accordance with so clear a directive so recently issued and, at least, not to circumvent it by ignoring it and then contending that a suspension of the Rules, which they failed to apply for, can be implied. *Cf.* the pungent comment of Mr. Justice Jackson that

> "It is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one-way street." *Rodgers v. United States*, 332 U.S. 380, 387-88 (1947) (dissenting opinion.)

CONCLUSION

For the foregoing reasons, the decision below should be reversed and the District Court's order should be vacated.

March 30, 1966.

Respectfully submitted,

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CERTIFICATE

I certify, that, in connection with the preparation of this brief, I have examined Rules 18 and 19, of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is a full compliance with its rule.

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